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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-1357

GENNARO BASCIANO *et al.*,

Petitioner,

v.

HAROLD HERKIMER, individually and as Executive Director of the New York City Employees Retirement System, etc., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN C. GRAY, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

GENNARO BASCIANO, et al.,

Petitioner,

v.

HAROLD HERKIMER, individually and as Executive Director of the New York City Employees' Retirement System and Head of the Bureau of Retirement and Pensions, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the

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1. Petitioner is GENNARO BASCIANO, individually and on behalf of all other persons similarly situated.

Respondents are HAROLD HERKIMER, individually and as Executive Director of the New York City Employees' Retirement System and Head of the Bureau of Retirement and Pensions, JOANN NOVI, individually and as Chief, Medical Division of the New York City Employees' Retirement

above styled case, which affirmed a summary judgment granted to the respondents by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A herein. The opinion of the District Court for the Southern District of New York is not reported. It is reproduced in Appendix B herein.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 15, 1978. It is reproduced in Appendix C herein. On February 8, 1979 the Honorable Thurgood Marshall Associate Justice of this Court granted an order extending petitioner's time for filing a petition for writ of certioriari to and in-

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System, THOMAS F. ROACH, individually and as Chairman of the Board of Trustees of the New York City Employees' Retirement System, SOL LEWIS, SOL GUARNIERI, MAURICE ZIERAGSKI, CHARLES SEVERANCE, BETRAM WEINERT, MICHAEL MORGAZZI, JEROME NEWBURGER, JOHN DELURI, PAT MARMO, ARTHUR TIBALDI, individually and as members of the Board of Trustees of the New York City Employees' Retirement System; CASCO ALTON, individually and as Chairman of the Medical Board, ARTHUR L. MATLES, HENRY SINGMAN, CLARENCE ROBINSON, EDWARD B. SHAPERO, MICHAEL A. CONSIGLIO, individually and as Members of the Medical Board of the New York City Employees' Retirement System.

cluding March 5, 1979. A copy of this order is reproduced in Appendix D herein. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fourteenth Amendment, petitioner may be finally deprived of his protected property interest in disability benefits without being afforded the opportunity to have some form of hearing?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Amendment XIV, to the Constitution of the United States provides in relevant part:

> Section 1. .... No State shall... deprive any person of life, liberty, or property, without due process of law;...

Administrative Code of the City of New York Sections B3-13.0 and B3-40.0 appear in the New York City Charter and Administrative Code, Chapter 3, Title B, (1976, Cum. Supp. 1978-1979). These sections are reproduced in Appendix A at page A-5, note 3.

STATEMENT OF THE CASE

Petitioner Gennaro Basciano had been employed by New York City as a laborer for twenty years when on February 27, 1973 he injured his back while pulling rods from a sewer in

Brooklyn. He has not worked since this accident.

On November 21, 1974 Basciano applied for accident disability retirement benefits under New York City's Employment Retirement System ("the System"). In support of his application Basciano submitted the reports of seven treating and consulting physicians who concluded that he was disabled, as well as statements from his co-workers and supervisors concerning the accident.

On June 12, 1975 he was examined for approximately five minutes by three doctors employed by the System's Medical Board ("the Board"). On the basis of this examination the Board concluded that Basciano was not disabled and therefore not entitled to accident disability retirement benefits pursuant to the Administrative Code of the City of New York ("the Code") §B3-40.0 (A-5, note 3). This conclusion, which was legally binding upon the System's Trustees, was duly adopted by them. On August 15, 1975 the trustees informed Basciano that his application had been denied.

Basciano requested that the Board reconsider its determination and submitted evidence showing that both the New York State Workman's Compensation Board and the Social Security Administration had awarded him benefits based upon the disability resulting from his February 27, 1973 accident.

New York State determined that petitioner had incurred a "permanent partial disability." The Social Security Administration determined that petitioner was "incapable of performing any substantial gainful activity" due to his disability. Thereafter, he was again examined for approximately five minutes by three doctors employed by the Board. They determined that he was not disabled. As before, the trustees of the System were legally bound by the Board's determination, and on January 23, 1977 informed Basciano that his application for benefits had been denied.

On May 12, 1977 petitioner, through counsel, requested respondent Herkimer to hold a hearing to enable Basciano to give oral testimony, present medical evidence, and to confront and cross-examine the Board physicians who determined he was ineligible for benefits. Respondent denied this request, stating that the Medical Board's determination was binding upon the System's Trustees.

Petitioner Basciano commenced the instant action, authorized by 42 U.S.C. §1983, in the Southern District of New York on May 17, 1977, invoking that court's jurisdiction pursuant to 28 U.S.C. §1343(3). On behalf of himself and a purported class of persons similarly denied disability benefits, Basciano sought a declaratory

judgment that the failure to provide any requisite of a meaningful hearing procedure deprived claimants of property without the due process of law guaranteed by the Fourteenth Amendment. Petitioner also sought an injunction against enforcement of the challenged Code procedures. In a decision and order of December 13, 1977 the district court held that Basciano's interest in accident disability retirement benefits was protected by due process, but that the challenged procedures afforded all the process that was due. (A-15) Judge Metzner stated that he was denying the motion for class certification because he had determined the merits adversely to Basciano.

Petitioner appealed to the United States Court of Appeals for the Second Circuit. In a judgment entered November 15, 1978 that court affirmed the order of the district court. (A-19).

In an order dated February 8, 1979 the Honorable Thurgood Marshall, Justice of this Court, extended petitioners time for filing a petition for writ of certiorari to and including March 5, 1979. (A-21). This petition for certiorari was filed within the time prescribed by Justice Marshall.

REASONS FOR GRANTING THE WRIT

THE CHALLENGED PROCEDURES DEPRIVED PETITIONER OF A PROTECTED PROPERTY INTEREST WITHOUT AFFORDING HIM THE OPPORTUNITY OF ANY HEARING IN DEFIANCE OF THIS COURT'S CONSISTENT INTERPRETATION OF THE DUE PROCESS CLAUSE

The court below held that petitioner's interest in receiving employment retirement disability benefits was protected by due process (A-8), but that he was afforded all the process that was due. The only procedural rights afforded by the challenged Code provision are as follows: (1) Prior to being examined by the Medical board, petitioner could file written statements and medical reports tending to establish eligibility. (2) Petitioner had the right, which he exercised, to seek reconsideration of a denial. This simply allowed for a repetition of the procedure described in (1) supra.

Originally and upon reconsideration three City employed physicians examined Basciano and thereafter determined whether he had an accident in City-service, whether the accident was the proximate cause of the alleged disability, whether the accident was caused by petitioner's wilful negligence, and whether petitioner was unable to resume his previous employment. The decision of the City employed doctors on all these factual issues,

medical and non-medical, is final and binding upon the trustees of the system[2], subject only to reconsideration by three other City employed doctors.

Basciano was not permitted to submit anything written or give oral testimony after the Medical Board's physical examination. Basciano could not protest the cursory nature of the examining procedures. He could not confront and cross-examine the doctor-fact finders on their technique or the disparity of their findings with those of the seven treating and consulting physicians, Workmen's Compensation, and the Social Security Administration, who all determined that Basciano was disabled.

This Court has consistently held that a person may not be deprived of an interest protected by due process without the opportunity for "some kind of hearing." Wolff v. McDonnell, 418 U.S. 539, 557-558 (1974). While the Court has at times enumerated elements of a hearing which it deemed "rudimentary due process" requisites,[3] in

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2. Despite the misunderstanding of the court below (A-11, note 5) the finality of the Medical Board's findings was an undisputed fact in the district court. (A-16, ¶ 1).

3. In Goldberg v. Kelly, 397 U.S. 254, 267-271 (1970) the court enumerated ten rudimentary due process safeguards. Basciano was not afforded one of these ten safeguards.

general the cases neither require government officials to offer a trial type hearing in every context, Dixon v. Love, 431 U.S. 105, 113 (1977) nor do they inflexibly compel the inclusion of any specific procedural safeguard in all circumstances. Mathews v. Eldridge, 424 U.S. 319, 348 (1976). However, the hearing must always afford those threatened with "grievous loss" "an opportunity to be heard" "at a meaningful time and in a meaningful manner." Joint Anti-Fascist Refugee Com. v. McGrath, 341 U.S. 123, 168 (1951); Grannis v. Ordean, 234 U.S. 385, 394 (1914); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The procedure challenged herein is so lacking in rudimentary safeguards and fundamental fairness that it cannot be dignified with the designation "hearing" as understood in our system of law.

A. Petitioner's Claims Are Supported By Assessment Under The Three Factor Test Of Mathews v. Eldridge

In Mathews v. Eldridge, supra, 424 U.S. at 335, which like the instant case involved a disability determination, the Court distilled from previous precedent three factors which must be assessed in determining what process is due in a given case. First, the private interest affected by official action; second, the probable value of additional or different safeguards; third, the

government's interest in avoiding additional procedural requirements.

1. The Private Interest Affected

Mathews v. Eldridge, supra at 340 and Richardson v. Perales, 402 U.S. 389 (1971) recognize the substantial stake which a disability benefits claimant has in the outcome of the determination. Eldridge likened this interest to those of the welfare recipients faced with a termination of benefits in Goldberg v. Kelly, supra, the discharged government employee in Arnett v. Kennedy, 416 U.S. 134 (1974), and the person whose wages were garnished in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 424 U.S. at 340. Basciano contributed to the City pension fund for twenty years to protect himself against the contingency of disability incurred as a result of an accident on his job. He has not returned to work in the six years since his accident. His vital stake in the disability determination is obvious.

2. The Risk of Erroneous Deprivation Under The Challenged Procedure

The risk of error under the challenged procedure is enormous, and the probable value of additional safeguards demonstrably great.

a. Error on Non-Medical Issues

The challenged procedure requires a panel of three City employed doctors to make the sole

and final determinations on both a medical issue, i.e., disability, and non-medical issues, i.e., whether an accident occured in City service, lack of willful contributory negligence, and proximate cause of disability. As to the non-medical issues, the court below observed:

> To the extent that, under the rather opaque provisions of the Code, the Medical Board has the effective final say on issues of whether the injury was sustained as a result of City-service and was not a result of wilful negligency by the employee, these issues are quite different from the one here presented. These are areas in which questions of credibility could be important. The Medical Board has no expertise; and the lack of any right of cross-examination of witnesses before either the Medical Board or the Trustees is troubling. (A-10, note 4).

The court below brushed aside these facially unconstitutional features of the Code by assuming that the decision to deny benefits to Basciano was based solely on the issue of disability. The lower court thus adopted a novel "harmless unconstitutionality" approach, which has no proper application in a case where petitioner demonstrated that his claim had been determined under procedures unconstitutional on their face.

In a case presenting issues nearly identical to the instant one, Davis v. United States, 415 F.Supp. 1086, 1094 (D. Kan. 1976)[4], the Kansas District Court rejected the government's contention that it should adopt the disingenuous analytical method applied below:

> The absence of a hearing in the current regulatory scheme is constitutionally significant because it so substantially impairs the integrity of the fact finding process.... A preview of the merits of the claim at this

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4. Davis, supra, involved a claim for benefits for disability resulting from work performed for the Federal Prison Industries Corporation. 18 U.S.C. §4126. The Attorney General's regulations setting forth the procedures for determining claims were similar to those challenged herein, in that they were nearly devoid of due process safeguards. 415 F.Supp at 1089. Those procedures at least provided for a final agency determination after the government's doctors reported their conclusions, unlike the instant procedures which give the doctors final say. Nevertheless, the Court ruled that Davis must be given a hearing which satisfied minimal due process standards including (1) written notice of the hearing and issues (2) the opportunity to appear, give oral testimony, and present favorable witnesses and documentation (3) confrontation and cross-examination of the government's doctor (4) a neutral hearing officer (5) a written statement specifying reasons should the claim be denied. 415 F.Supp at 1098. The opinion discusses at length the harmony of its holdings with those of this Court in Richardson v. Perales, supra and Mathews v. Eldridge, supra, 415 F.Supp. at 1097, note 15.

> juncture without a hearing would involve the Court in the very vice sought to be eradicated. Regardless of the alleged subjective nature or the individual merits of plaintiff's claim, the present procedure is constitutionally inadequate to resolve this or any other claim because it arbitrarily permits the prison physician's contrary medical conclusion to stand totally unchallenged and provides no meaningful method to assert the statutory right.

The record before the courts below discloses that Basciano was never informed of the basis for denial either originally or upon reconsideration. In each case he was sent a form letter stating that he was:

> not mentally or physically incapacitated for the performance of City-service as a natural and proximate result of an accidental injury received in such City-service while a member and while in the performance of duty... (emphasis in originals).

The challenged procedures do not provide for notice more specific than this. Only through requests by his attorney was Basciano permitted to examine his file and infer the actual basis of the denial.

In employing its harmless unconstitutionality analysis, the court below disregarded the fact that

the action had been brought on behalf of a class of all claimants denied disability benefits pursuant to the allegedly unconstitutional procedures. Neither court below disputed that the class met all the requirements of Rule 23(a),(b)(2) of the Federal Rules of Civil Procedure. The district court merely stated that it was denying class status because it had determined the merits adversely to Basciano. This normless denial violated the letter, spirit, and judicial interpretation of Rule 23. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178 (1974); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 545-549 (1974); Miller v. Mackey International, 452 F.2d 424, 427 (5th Cir. 1971); Peritz v. Liberty Loan Corp., 523 F.2d 349, 353-354 (7th Cir. 1975); Napier v. Gertrude, 542 F.2d 825, 827 (10th Cir. 1976)[5].

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5. These cases hold that in accordance with Rule 23(c)(1), class status must be determined as soon as practicable and prior to a ruling on the merits. An adverse determination on the merits is not a proper basis for denial of class relief. Speedy class determination divorced from a view of the merits prevents the one-way intervention abuse sought to be eradicated by the drafters of the present Rule 23. American Pipe & Construction Co. v. Utah, supra, 414 U.S. at 545-549.

The denial was appealed to the Second Circuit which affirmed without explanation. By improperly denying class action status, the court below was able to state with impunity that Basciano was not harmed by a procedure which the court recognized was unconstitutional and prone to error. (A-10, note 4).

b. Error On Medical Issues

The panel of three City employed doctors make the sole and final determination on the issue of disability, subject to reconsideration by another panel composed of three City employed doctors. Although this panel receives medical reports a claimant wishes to submit prior to the panel's medical examination, the claimant cannot submit anything after examination. As demonstrated in petitioner's case, the ability to submit medical reports to the panel serves little or no purpose, since there is no impartial arbiter to weigh conflicting medical conclusions. Petitioner's panel had before it the reports of seven treating and consulting physicians, the Workmen's Compensation Board, and the Social Security Administration, who all concluded that Basciano was disabled. Counsel's examination of the file revealed that the panel did not even attempt to account for the disparity of the medical conclusions. Basciano does not contend that the disagreement is of

legal significance in itself. However, the high probability of error implicit in a procedure mixing investigative with adjudicative functions would be greatly alleviated if an impartial arbiter could weigh the various medical opinions.

The Medical Board neither keeps record of reversals on reconsideration nor reversal accomplished through state judicial review on substantial evidence grounds. In this void the experience of the Social Security Administration in disability determinations is instructive. In Richardson v. Perales, supra the Court cited a rate of reversal after evidentiary hearing of 44.2%. 402 U.S. at 410. In Mathews v. Eldridge, supra the cited reversal rate after evidentiary hearing was 58.6%. 424 U.S. at 346. Barring some factor which makes the City's doctors more reliable, these statistics demonstrate that the institution of a meaningful right to be heard would substantially reduce the high risk of error implicit in the challenged procedures.

3. The Government's Interest In Avoiding Additional Procedural Safeguards

The inclusion of rudimentary procedural safeguards would entail some expense to the pension system. However, in light of the above discussion, it cannot be seriously contended that this expense outweighs the benefit to be obtained

by greatly reducing the risk of erroneous deprivations. The pension system, unlike other government entities, was created exclusively to aid its member-contributors. Cost-benefit analysis focuses on their interests. The interests of the public at large are limited to insuring that eligible claimants receive these benefits rather than need based payments supported by taxes, and a general public interest in fair procedures. In this case the interests of petitioner, other members of the System, and the general public are congruent.

B. Petitioner's Contentions Are Consistent With The Court's Decisions In Mathews v. Eldridge and Richardson v. Perales

In Mathews v. Eldridge, supra and Richardson v. Perales, supra, this Court assessed the validity of procedures for determining disability claims in response to due process challenges. The regulations upheld in Eldridge provided for an elaborate set of procedural safeguards prior to suspension of disability payments[6], followed by

6. These included: 1) the initial opportunity to present medical or other evidence; 2) a physician and a lay person evaluate information obtained from persons currently treating the claimant; 3) examination by an independent consulting physician; 4) if suspension of payment is still contemplated, the claimant is provided a summary of the evidence, given access to his file, and may make a written submission or offer additional evidence. 424 U.S. at 337-339.

an opportunity to seek reconsideration from both the state agency and the Social Security Administration. Thereafter the claimant could obtain a full evidentiary hearing before an Administrative Law Judge, including the right to subpoena physicians and cross-examine them. Adverse hearing decisions may be appealed to the Administration's Appeals Council. 424 U.S. at 337-339.

In Richardson v. Perales, supra the Court scrutinized the Social Security Administration's procedures for initial determination of disability claims. These included an array of procedural safeguards similar to those afforded in the pre-termination context, 20 CFR §§404.901 et seq. and 404.1501 et seq., the right to a full evidentiary hearing, and Appeals Council review. The narrow issue before the Court in Perales was whether hearsay in the form of medical reports could, standing alone, constitute substantial evidence for the denial of a disability claim. In answering affirmatively, this Court stressed no less than seven times that the claimant had the unexercised right to subpoena the physicians and subject them to cross-examination[7]. This

7. 402 U.S. at 397, 398, 402, 404, 406, 407, 410.

repeated emphasis bears witness to the Court's belief that the opportunity to cross-examine must be guaranteed in the context of medical determinations[8].

In contrast, the court below denigrated the value of cross-examination in this context and both praised and adopted the English system wherein government doctors have sole and final say on medical issues[9]. This preference for the English system coincides with views expressed by Judge Friendly, a member of the panel below, in his article "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1285 (1975). With all due respect to Judge Friendly and his learned brothers

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8. Davis v. U.S., supra. discussed more fully at page 12, supra discusses at length the harmony of Perales and Eldridge with due process claims which are nearly identical to petitioner's.

9. At (A-12, note 6) the court below approvingly quoted Davis' Administrative Law of the Seventies, §7.00-1.1 (Supp. 1977):

> "In England the question whether the human body is disabled is determined by physicians in government employ who use physicians' methods of examining the body and making a decision -- without the benefit of allowing lawyers to complicate the process. Might that be more sensible than the American system?..."

on the panel below, it is not their province but that of this Court to initially sanction such a major departure from the precedents of the legal system of our nation.

C. The Minimum Requisites of Due Process In This Case

Petitioner contends that at the very minimum the Due Process Clause requires that he be afforded the opportunity for a hearing which would include the following rudimentary procedural safeguards:

1. A Statement Detailing The Reasons For The Proposed Denial Of Disability Benefits

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for an impending 'hearing'". Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13 (1978) citing Wolff v. McDonnell, supra, 418 U.S. at 564; Morrisey v. Brewer, 408 U.S. 471 (1972); In Re Gault, 387 U.S. 1 (1967); Joint Anti-Facist Committee v. McGrath, supra. Respondents practice is to send a non-specific form denial. (Page 13, supra). Indeed, the vagueness of the notice is hardly relevant under the challenged procedures, since the notice announces a Board decision which is final. However, notice would become significant if the respondents were required to provide Basciano with a hearing.

2. The Opportunity To Appear And Present Oral Testimony

In Londoner v. Denver, 210 U.S. 373, 386 (1908) the Court stated:

> "[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal."

This observation was recently quoted with approval in Memphis Light, Gas & Water Div. v. Craft, supra, 436 U.S. at 16 n. 17, and finds expression even in such contexts as school and prison disciplinary proceedings, where other interests militate for the most summary and informal procedures. Goss v. Lopez, 419 U.S. 565, 581 (1975); Wolff v. McDonnell, supra, 418 U.S. at 566. Gibbs v. N.Y. City Employees Retirement System, N.Y.L.J., 11/18/76, p. 10, col. 4 (Sup. Ct. N.Y. Cty. 1976) is a decision on point. The New York Supreme Court held that due process required that an unsuccessful claimant for the same benefits at issue herein be provided a hearing affording him the opportunity to present oral testimony on medical issues. See Davis v. U.S., supra, 415 F.Supp. at 1098.

3. The Opportunity To Confront And Cross-Examine Adverse Witnesses

As previously discussed at page 18, supra, the Court in Richardson v. Perales repeatedly stressed the importance of providing an applicant for disability benefits an opportunity to cross-examine adverse medical witnesses. Perhaps the most eloquent expression of the fundamental position of the right to cross-examination in our system of justice is found in this Court's decision in Greene v. McElroy, 360 U.S. 474, 496-497 (1959):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.... We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.... This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases... but also in all types of cases where administrative... actions were under scrutiny.

Accord, Willner v. Committee on Character

And Fitness, 373 U.S. 96, 103, (1963); Davis v. U.S., supra, 415 F.Supp. at 1098.

4. An Impartial Fact-Finder

"An ofcourse an impartial decision maker is [an] essential" due process requisite. Goldberg v. Kelly, supra, 397 U.S. at 271. Cf. In Re Murchison, 349 U.S. 133 (1955). Accord Davis v. U.S., supra, 415 U.S. at 1098. This would only require the trustees of the system to appoint someone to hear testimony and weigh the conflicting medical conclusions presented.

In other than emergency situations affecting the public health or safety, the Court in this century has not upheld the deprivation of a protected property interest achieved without affording the opportunity of "some form of hearing." Mathews v. Eldridge, supra, 424 U.S. at 333. The procedures challenged herein do not constitute a hearing as understood by the precedents of this Court. The challenged procedures and the decision below stand as an affront to the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For all the foregoing reasons, petitioner Gennaro Basciano prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered

in this case on November 15, 1978.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 997—September Term, 1977.

(Argued May 31, 1978 Decided November 15, 1978.)

Docket No. 78-7035

GENNARO BASCIANO, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

—v.—

HAROLD HERKIMER, individually and as Executive Director of the NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM and Head of the BUREAU OF RETIREMENT AND PENSIONS, *et al.*,

Defendants-Appellees.

Before:

FRIENDLY and TIMBERS, *Circuit Judges*, and HOFFMAN, *District Judge.**

Appeal from a judgment entered in the Southern District of New York, Charles M. Metzner, *District Judge*, on a motion for summary judgment by the City of New York, dismissing the complaint of a former City employee who claimed that the City's procedure for determining his eligibility for accident disability retirement benefits deprived him of due process of law.

Affirmed.

* Hon. Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

HAROLD ADLER, Brooklyn, N.Y. (John C. Gray, Jr., and Brooklyn Legal Services Corp., Brooklyn, N.Y., on the brief), *for plaintiff-appellant.*

L. KEVIN SHERIDAN, Assistant Corporation Counsel, New York, N.Y. (Allen G. Schwartz, Corporation Counsel, New York, N.Y., on the brief), *for defendants-appellees.*

TIMBERS, *Circuit Judge*:

This is an appeal from a judgment entered in the Southern District of New York, Charles M. Metzner, *District Judge*, on a motion for summary judgment by the City of New York, dismissing the complaint of a former City employee who claimed that the City's procedure for determining his eligibility for accident disability retirement benefits deprived him of due process of law.

For the reasons below, we affirm.

I.

The facts are straightforward and not in dispute. Both sides moved for summary judgment below.

On February 27, 1973 Basciano sustained a back injury while employed as a laborer by the City's Department of Water Resources. He was engaged at the time in pulling rods from a sewer in Brooklyn.

A week after the accident Basciano reported his back pain to his own doctor. The latter found the x-rays normal

but diagnosed Basciano's condition as a paralumbar muscle spasm with resulting tenderness in the lower back. The doctor advised Basciano to rest at home, recommended a course of physical therapy, and told him not to return to work. Basciano's condition thereafter was re-evaluated periodically by his doctor whose final diagnosis was chronic back spasm. Basciano did not return to work.

On November 21, 1974, twenty-one months after the accident, Basciano applied for accident disability retirement benefits under the City's Employees' Retirement System (the System). In support of this application he submitted reports of seven doctors regarding his alleged disability, together with statements from his co-workers and his supervisor concerning the accident.

On April 29, 1975 Basciano was interviewed by the Chief of the System's Medical Division concerning his employment status and the circumstances of the accident.

On June 12, 1975 he was examined by three doctors from the System's Medical Board (the Board). During this examination the doctors probed the area around Basciano's injury and instructed him to perform a number of movements. Their report noted that motion in his lower back was restricted, that he complained of tenderness, but that there was no spasm (contrary to the diagnosis of Basciano's doctor). On the basis of this examination and the medical history, the Board concluded that Basciano was not disabled and therefore was not eligible for accident disability retirement benefits.

The Board's report was forwarded to the System's Trustees who denied Basciano's application on August 15, 1975.

The Trustees thereafter advised Basciano that he had the right to examine the evidence used by the Board in reaching its decision. He did so. After reviewing the evidence he requested the Board to reconsider its decision.

He also submitted additional evidence not previously considered by the Board.[1]

On November 23, 1976 Basciano again was examined by three doctors from the Board, none of whom had participated in Basciano's prior examination. They again found some restriction of movement but no muscle spasm. The Board affirmed its prior decision that Basciano was not disabled and recommended that his application for disability benefits be denied.

On January 23, 1977 the Trustees accepted the Board's recommendation and affirmed the Trustees' prior denial of benefits to Basciano.

On May 17, 1977 Basciano commenced the instant class action[2] pursuant to 42 U.S.C. §1983 (1970) seeking declaratory and injunctive relief. Among other claims, he asserted that the City's failure to grant an opportunity for a hearing to applicants who are denied accident disability retirement benefits violates the due process clause of the Fourteenth Amendment.

Upon cross-motions for summary judgment, the district court on December 13, 1977 filed an opinion holding that Basciano's interest in accident disability retirement benefits is protected by due process and that the System's procedure satisfied the requirements of due process.

From the judgment entered December 15, 1977 on Judge Metzner's opinion, the instant appeal has been taken.

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1 The additional evidence submitted by Basciano at this time related to (1) a determination by the New York Workmen's Compensation Board on January 23, 1976 that he had sustained a permanent partial disability, as the result of which he was awarded a payment, and (2) a determination by the Social Security Administration on September 14, 1976 that he had sustained an impairment which prevented him from engaging in substantial gainful employment, as the result of which he was awarded disability insurance payments.

2 Judge Metzner's opinion of December 13, 1977, referred to below, denied Basciano's motion for class certification.

II.

Basciano challenges on due process grounds the constitutionality of the procedure pursuant to which he was denied disability retirement benefits under the City's retirement system. This requires an analysis of the relevant provisions of the Administrative Code of the City of New York (the Code), which are set forth in the margin.[3] Such analysis is

3 The relevant provisions of the Administrative Code of the City of New York are under Chapter 3, Title B, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM (1976):

"§B3-13.0 **Medical board.**—

a. (1) There shall be a medical board of three physicians. One of such physicians shall be appointed by the board and shall hold office at the pleasure of such board, one shall be appointed by the administrator of health services or any successor to such administrator's principal functions in relation to health (other than mental health and mental retardation) and shall hold office at the pleasure of such administrator or successor, and the third shall be appointed by the personnel director of the department of personnel and shall hold office at the pleasure of such director.

(2) The board, the administrator of health services or any such successor and the personnel director shall each have power to appoint one or more but not exceeding four alternate physicians, who shall hold office at the pleasure of such appointing board or official. Whenever the board of trustees of the retirement system shall so direct, the functions, powers and duties of the medical board, in addition to being performed and exercised by the three physicians appointed pursuant to paragraph one of this subdivision, shall be performed and exercised by one or more groups of three physicians as hereinafter prescribed. Each such group of three physicians shall function separately as the medical board and each such group may consist partly of a physician or physicians appointed pursuant to such paragraph one and partly of one or more alternate physicians or may consist entirely of alternate physicians; provided, however, that one of the physicians or alternate physicians in each such group shall be appointed by the board, one by the administrator of health services or any such successor and one by the personnel director.

(Cum. Supp. 1977-78).

* * * * *

§B3-40.0 **Retirement, for accident disability.**—Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or on his behalf in connection therewith shall be made upon the application of the head of the agency in which the member is employed, or upon the

(footnote continued on following page)

rendered somewhat difficult by the obscurity of those provisions. Nevertheless, the following is a brief summary of the procedure provided by the Code—and the procedure pursuant to which Basciano's application was processed in the instant case, as stated above.

Section B3-40.0 of the Code sets forth the procedure for determining whether a City employee has become physically

application of a member or of a person acting in his behalf, stating that such member is physically or mentally incapacitated for the performance of city-service, as a natural and proximate result of such city-service, and certifying the time, place and conditions of such city-service performed by such member resulting in such alleged disability and that such alleged disability was not the result of wilful negligence on the part of such member and that such member should, therefore, be retired. Such application shall be filed within two years from the happening of such accident, except, however, that such requirement as to time of filing shall not apply to any such application which (1) is filed by or with respect to a member who is a member of the uniformed force of the department of sanitation (as such force is defined in subdivision a of section B3-36.2 of the code) and (2) is based on an accident occurring wholly on or after July first, nineteen hundred sixty-three. If such medical examination and investigation shows that any member, by whom or with respect to whom an application is filed under this section, is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, and that such disability was not the result of wilful negligence on the part of such member and that such member should be retired, the medical board shall so certify to the board stating the time, place and conditions of such city-service performed by such member resulting in such disability, and such board shall retire such member for accident disability forthwith.

b. 1. If such application is denied solely on the ground that such member is not, at the time of such examination, physically or mentally incapacitated for the performance of city-service, such application may thereafter be renewed during such member's city-service at any time within five years from the happening of the accident but preceding the date on which such member shall have reached his minimum service retirement age, provided he submits himself to such further examinations as the medical board may require.

2. Such further application or applications shall be considered on the same basis as the original application.

3. The medical board may at any time within five years of the happening of the accident, upon findings that such member is eligible

(footnote continued on following page)

or mentally incapacitated for further work as the result of an accident sustained while working as a City employee. Such determination in favor of the employee is a necessary predicate for awarding him disability retirement benefits.

The determination required by §B3-40.0 is made by a Medical Board (the Board) composed of three physicians in accordance with §B3-13.0 of the Code. The applicant for disability retirement benefits must submit to a medical examination and investigation by, or under the supervision of, the Board. The applicant may submit documentary medical evidence to the Board before his medical examination.

If the Board finds that the applicant has sustained an accident disability as the result of his City employment, it so certifies to the Trustees who are constituted in accordance with §B3-2.1 of the Code. In such event, the Trustees are required to retire him for such disability.

If, however, the Board makes a determination adverse to the applicant, the latter may review the evidence relied upon by the Board and may request reconsideration upon a showing of new evidence. The Trustees in such event may refer the case back to the Board for re-evaluation. The Board then may require the applicant to submit to a further medical examination.

In arguing that this procedure is constitutionally inadequate, Basciano contends that an application for disability should not be denied on the basis of a Board examination until the applicant is given a full hearing before an impartial decision maker. At such a hearing, Basciano contends, the applicant should be entitled to subpoena physicians, to testify himself, and to present other evidence on his own behalf.

for and should be retired for accident disability in accordance with the provisions of this section, certify to the board said fact, and such board shall retire such member for accident disability forthwith.

4. The provisions of paragraphs one, two and three of this subdivision b shall not apply in the case of any member who is a member of the uniformed force of the department of sanitation and who files an application under subdivision a of this section based on an accident occurring wholly on or after July first, nineteen hundred sixty-three."

We shall discuss below Basciano's contentions, as well as other aspects of the procedure which appear to be bothersome—both on the face of the Code and as applied here.

III.

Before turning to the central issue in the case—whether the City's procedure for determining eligibility for accident disability retirement benefits deprived Basciano of due process of law—we must decide preliminarily whether his interest in those benefits is of such a character as to warrant due process protection.

The district court held that Basciano's interest in such benefits is protected by due process. We agree. Those who meet the eligibility requirements of the City's Employees' Retirement System are entitled to disability retirement benefits under the Code. Where a scheme such as this gives rise to a valid claim of entitlement to a benefit, a property interest protected by the due process clause of the Fourteenth Amendment is created. *Memphis Light, Gas and Water Division* v. *Craft*, —— U.S. ——, —— (1978), 46 U.S.L.W. 4398, 4400-02 (U.S. May 1, 1978); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

We hold therefore that Basciano has satisfied the threshold requirement of establishing an interest entitled to due process protection.

IV.

This brings us to the central issue in the case as stated above—whether the City's procedure for determining

Basciano's eligibility for accident disability retirement benefits deprived him of due process of law. The district court held that it did not. We agree.

We look for guidance to Mr. Justice Powell's formulation in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), of the three distinct factors to be analyzed in determining whether administrative procedures are constitutionally sufficient:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

The issue in *Mathews* was whether due process required an opportunity for an evidentiary hearing before termination of Social Security disability benefits. Mr. Justice Powell's formulation set forth above took account of the Court's prior decisions, including *Goldberg* v. *Kelly*, 397 U.S. 254, 263-71 (1970). Moreover, as we also were reminded in *Mathews*:

> "'"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)." 424 U.S. at 334.

In the instant case we look first at the private interest affected by the official action. While Basciano had a substantial interest in the outcome of the proceeding, his interest was less compelling than that of an individual denied by government action the "very means by which to live". *Goldberg, supra*, 397 U.S. at 264. As the Court observed in *Mathews, supra*, 424 U.S. at 340-41, eligibility for disability benefits does not turn on financial need. Here, Basciano has received a Workmen's Compensation payment and Social Security Act disability payments. See note 1 *supra*.

The adequacy of the present procedure provided by the Code, and the potential value of additional or substitute procedural safeguards, depends largely on the purpose of the inquiry. In order to establish an applicant's eligibility for accident disability retirement benefits the Board must determine that: (1) he is "physically or mentally incapacitated for the performance of city-service," (2) "as a natural and proximate result of an accidental injury received in such city-service," and (3) "such disability was not the result of wilful negligence on [his] part." Code §B3-40.0. Here Basciano submitted uncontroverted affidavits by his co-workers that his injury resulted from an on-the-job accident; it is not claimed that his injury resulted from negligence on his part.[4] Consequently, the purpose of the inquiry was essentially to make a medical determination as to whether Basciano's physical condition incapacitated him for the performance of city-service. The medical examination was made by a medical board com-

4 To the extent that, under the rather opaque provisions of the Code, the Medical Board has the effective final say on issues of whether the injury was sustained as a result of city-service and was not a result of wilful negligence by the employee, these issues are quite different from the one here presented. These are areas in which questions of credibility could be important. The Medical Board has no expertise; and the lack of any right of cross-examination of witnesses before either the Medical Board or the Trustees is troubling.

posed of three physicians, constituted in accordance with §B3-13.0 of the Code. Their responsibility was to make a medical judgment, not to function as adversaries or advocates. The fairness of this eligibility determination therefore turned on the reliability of the Board's conclusion, not on questions of witness credibility.

Certain aspects of the procedure provided by the Code and followed in the case of Basciano tend to assure reliability of the Board's conclusion. First, Basciano availed himself of the opportunity to present the opinions of his own doctors; these were considered by the Board in connection with its first examination. Second, he later was permitted to present further evidence to the Board in support of his request for reconsideration of its initial decision. Third, he was examined by six different doctors on behalf of the Board.

Despite all of this, Basciano has never indicated in what respect the Board's specific findings were incorrect. A mere difference of opinion between Basciano's doctors and those who examined him on behalf of the Board concerning the ultimate issue of disability does not establish that the Board's decision was unreasonable. Moreover, Basciano has never specified in what respect, if any, the present procedure resulted in an erroneous determination.

We are not persuaded of the value of the additional or substitute procedural safeguards which Basciano asserts are required by due process. The gravamen of his complaint is that subsequent to his initial medical examination he was not given a hearing before the Trustees; and that the Trustees were required to accept the findings of the Board.[5] Consequently, according to Basciano, he had no

5 The Code does not say that the Trustees are required to accept negative findings by the Board, although we suppose they are likely to do so.

way of challenging the effectiveness of the examination or of insuring that the examining physicians actually considered the evidence submitted in support of his application. Absent such a hearing under the present procedure, Basciano asserts that he could not cross-examine the Board members. Moreover, he contends that, because evidence in support of his application could be submitted only prior to the initial examination, he had no opportunity to rebut the Board's initial findings.

While questions of credibility and veracity often are best resolved in a trial-type hearing, we believe that evidence relevant to a medical determination can be presented as effectively in writing as orally. Moreover, the value of cross-examination to discredit a professional medical opinion at best is limited. A trial-type proceeding before the Trustees presumably would require the resolution of conflicting medical opinions by lay administrators. We know of no evidence that this would assure a more reliable final determination sufficient to make this an element of due process.[6]

Basciano contends that only at such a hearing could he have presented evidence to rebut that relied upon by the Board. This overlooks that prior to the initial examination

6 In the 1977 Supplement to his Administrative Law Treatise, §7.00-1.1, Professor Kenneth Culp Davis states:

"In England the question whether a human body is disabled is determined by physicians in government employ who use physicians' methods of examining the body and making a decision—without the benefit of allowing lawyers to complicate the process. Might that be more sensible than the American system? . . ."

See J. Garner, Administrative Law (3d ed. 1970) 236 and *R.* v. *Medical Appeal Tribunal (North Midland Region), Ex parte Hubble* [1958] Q.B. 228, [1958] All. E.R. 374; Friendly, Foreword to Schwartz & Wade, Legal Control of Government: Administrative Law in Britain and the United States xvi n. 5 (1972); and Friendly, "*Some Kind of Hearing*", 123 U.Pa. L. Rev. 1267, 1285 (1975).

Basciano himself provided all the evidence (other than its own examination) relied upon by the Board and had the right exercised here, to present further responsive evidence on an application for reconsideration.

Basciano also asserts that such a hearing would have enabled him to cross-examine the members of the Board concerning the propriety of their examination techniques and the sufficiency of their findings. As a practical matter, as part of his request for reconsideration submitted to the Trustees, he could have challenged the thoroughness of the examination or the weight accorded specific evidence. In any event, in view of the availability of his prior medical history and the nature of his injury, the record does not support his characterization of the examination as "cursory".

We hold that Basciano has not established his claim of inadequacy of the present procedure as applied to him; and that he has failed to demonstrate that additional or substitute procedural safeguards would have enhanced significantly the accuracy of his eligibility determination.[7]

Finally, our conclusion as to the adequacy of the City's present procedure is consistent with the City's very substantial interest in avoiding the administrative cost of setting up a procedure for trial-type hearings which we are satisfied ultimately would contribute very little to the accuracy and reliability of eligibility determinations. The

7 Both sides, and particularly the City, urge upon us *Siletti* v. *New York City Employees' Retirement System*, 401 F.Supp. 162, 167-68 (S.D.N.Y. 1975), *aff'd with oral opinion*, 556 F.2d 559 (2 Cir.), *cert. denied*, 434 U.S. 829 (1977), where the district court held that confrontation and cross-examination of witnesses was not required since the credibility of Board members was not likely to be put in issue. Aside from the lack of precedential effect of *Siletti*, we think that the focus of that decision was on the question of an adversary hearing and not on whether certain procedures here urged by Basciano were required. We do not rely upon *Siletti* for our holding in the instant case.

City's interest in avoiding such administrative costs is particularly strong here since such costs presumably would have to be borne by the Retirement System.

To summarize: The City's present procedure provides for a reasonably reliable determination of eligibility for accident disability retirement benefits. A trial-type hearing before the Trustees would not enhance significantly the accuracy of a disability determination. While the interest of the individual in receiving benefits is significant, the City has a substantial interest in avoiding the administrative cost of any unnecessary procedure. We conclude that the City's present procedure satisfied the requirements of due process in this case.[8]

Affirmed.

8 Our holding that the City's present procedure satisfied the requirements of due process as applied to the instant case is not to be construed as foreclosing a successful challenge on due process grounds in another case on different facts.

We are not unmindful of certain aspects of the City's procedure under the somewhat obscure provisions of the Code which might prove bothersome in a different case. For example, an employee arguably might claim that he has no way of making known to the Trustees how rudimentary his examination by the Board doctors had been; or that the statement of reasons included in the Board's report to the Trustees may have been so uninformative as to preclude the employee from making any meaningful objection to the Trustees; or that the Trustees, before determining whether an employee "is physically or mentally incapacitated for the performance of city-service", should be required to provide the employee with a detailed statement of reasons and an opportunity to file opposing material with the Trustees. *Cf. Matter of Balash* v. *New York City Employees' Retirement System*, 34 N.Y.2d 654, 311 N.E.2d 649, 355 N.Y.S. 2d 577 (1974); but see also *Meschino* v. *Lowery*, 31 N.Y.2d 772, 774, 290 N.E.2d 825, 826, 338 N.Y.S.2d 625, 626 (1972).

We would urge the City to consider amendment of its procedures to eliminate such objections. While we have carefully considered each of these objections in the context of the instant case and find that they do not change our holding, we leave to another day how we would rule on different facts.

In short, all we hold today is that in *this* case, on *these* facts, *this* plaintiff was not denied due process of law by the City's procedure as here applied.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

GENNARO BASCIANO, Individually and on behalf of all other persons similarly situated,

Plaintiff,

v.

HAROLD HERKIMER, Individually and as Executive Director of the New York City Employees' Retirement System and Head of the Bureau of Retirement and Pensions, et al.,

Defendants.

----------x

No. 77 Civ. 2451 (CMM).

Dec. 13, 1977

METZNER, D.J.:

Plaintiff has brought this action pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief on his claim that he was deprived of his constitutional right to due process of law in the proceedings which resulted in defendants' refusal to grant him accident disability benefits. Defendants move pursuant to Fed. R. Civ. P. 56 for an order granting them summary judgment and dismissing the complaint. Plaintiff cross moves for an order granting him summary judgment.

The material facts in this case are not in dispute. Plaintiff applied for accident disability benefits on November 21, 1974, from the New York City Employ-

ees' Retirement System (the System) claiming that he had been injured on the job while employed by the Department of Water Resources of the City of New York. Plaintiff submitted, along with his application, reports from seven doctors concerning his alleged disability. On April 29, 1975, plaintiff was interviewed by the Chief of the System's Medical Division, and on June 12, 1975, was examined by three doctors from the System's Medical Board (the Board). The Board determined that plaintiff was not eligible for disability benefits and forwarded its report to the System's Board of Trustees, which voted on August 15, 1975, to deny plaintiff's application. The Trustees are required by law to accept the findings of the Board.

Plaintiff was subsequently advised by the Trustees that he had the right to examine the evidence used by the Board in reaching its determination. Plaintiff reviewed the evidence and requested the Board to reconsider its decision. Plaintiff also submitted additional evidence previously not considered by the Board. On November 23, 1976, plaintiff was again examined by three doctors from the Board. However, the Board affirmed its prior decision that plaintiff was not eligible for disability benefits. The Trustees again adopted the Board's decision.

The first issue to be considered is whether plaintiff's interest in accident disability benefits is protected by due process. This question has previously been answered in the affirmative. See, Siletti v. New York City Employees' Retirement System, 401 F.Supp. 162, 167

(S.D.N.Y., 1975), and cases cited therein.

The remaining issue raised by plaintiff is whether the procedures employed for the determination of his eligibility for accident disability benefits comply with the requirements of due process.

It is well established that "a trial type hearing in every conceivable case of government impairment of private interest" is not required by due process. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894 (1961). The only requirement is that there be "some kind of notice and . . . some kind of hearing." Goss v. Lopez, 419 U.S. 565, 579 (1975).

Plaintiff claims that he was denied due process because he was not permitted to present witnesses and was not permitted to cross-examine the doctors on their findings. Plaintiff is well aware that the statutory proceeding employed by defendants in the determination of his eligibility for disability benefits has been found to be constitutional. Siletti v. New York City Employees' Retirement System, supra. He argues, however, that the instant case is distinguishable on the grounds that he is challenging the credibility of the Board's doctors, and if he had been permitted an adversary type hearing on his application, the result would have been different.

The court is not persuaded by this argument. The fact that the Board reached a conclusion contrary to that reached by other medical authorities does not prove that the procedures used by

defendants were violative of due process. Parenthetically, it may be that the other medical authorities are wrong in their conclusions.

In this case plaintiff was permitted to submit written evidence to the Board for its determination, appeared before three of the Board's doctors, was able to examine the evidence the Board used in reaching its determination and was able to submit additional evidence to the Board for reconsideration. Therefore, the procedures used by defendants in determining the plaintiff's eligibility for accident disability benefits were not violative of due process. Mathews v. Eldridge, 424 U.S. 319 (1976); Siletti v. New York City Employees' Retirement System, supra.

Accordingly, defendants' motion for summary judgment is granted and the complaint in this action is dismissed; plaintiff's cross motion for summary judgment is denied.

SO ORDERED.

Dated: New York, New York
December 12, 1977

CHARLES M. METZNER
U. S. D. J.

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of November, one thousand nine hundred and seventy-eight.

Present: HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. WALTER E. HOFFMAN
District Judge

78-7035

Filed
Nov. 15, 1978
A. Daniel Fusaro,
Clerk

GENNARO BASCIANO, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

vs.

HAROLD HERKIMER, individually and as Executive Director of 78-7035 the New York City Employees' Retirement System and Head of the Bureau of Retirement and Pensions, JOANN NOVI, individually and as Chief, Medical Division, of the New York City Employees' Retirement System, THOMAS F. ROACH, individually and as Chairman of the Board of Trustees of the New York City Employees' Retirement System, SOL LEWIS, SOL GUARNIERI, MAURICE ZIERAGASKI, CHARLES SEVERANCE BETRAM WEINERT, MICHAEL MORCAZZI, JEROME NEW-

BURGER, JOHN DELURI, PAT MARMO, ARTHUR TIBALDI, individually and as members of the Board of Trustees' of the New York City Employees' Retirement System; CASCO ALTON, individually and as Chairman of the Medical Board, ARTHUR L. MATLES, HENRY SINGMAN, CLARENCE ROBINSON, EDWARD B. SHAPERO, MICHAEL A. CONSIGLIO, individually and as Members of the Medical Board of the New York City Employees' Retirement System,

Defendants-Appellees,

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

BY:
Arthur Heller
Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-713

Gennaro Basciano, et al.,

Petitioners,

v.

Harold Herkimer, etc., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),
IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 5, 1979.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 8th day of February, 1979

Supreme Court, U. S.
FILED
MAY 21 1979
MICHAEL RODAK, JR., CLERK

78-1357

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 1357

GENNARO BASCIANO et al.,

Petitioner,

v.

HAROLD HERKIMER, individually and as Executive Director of the New York City Employees Retirement System, etc. et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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L. KEVIN SHERIDAN,
PETER LAVIGNE,
of Counsel.

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Friendly, Some Kind of Hearing,
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 1357

GENNARO BASCIANO et al.,

Petitioner,

v.

HAROLD HERKIMER, individually and as Executive Director of the New York City Employees Retirement System, etc. et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

The respondent, Harold Herkimer, Executive Director of the New York City Employees Retirement System, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the Court of Appeals for the Second Circuit in this

case. The opinion of the Court of Appeals is not yet reported, but has been reproduced and appended as appendix A to the petition, pages A-1 to A-14. The opinion of the District Court for the Southern District of New York, appendix B to the petition, is located at pages A-15 to A-18.

Statement of the Case

As both the Court of Appeals and the District Court noted, the material facts in this case are not in dispute (A-2, A-15). However, despite this essential lack of dispute, we do not accept as adequate the statement of the facts in the petition, and instead would refer the Court to the opinion of the Court of Appeals for a fuller statement of the relevant facts. In addition, we would especially note the following:

The Court of Appeals held (A-4, A-16), and petitioner admits this in his statement

of facts (Petition, at 4), that the Retirement System's Medical Board ("Board") concluded that Basciano was not disabled, and it was for this reason that he was held not eligible for accident disability retirement benefits. As the Court of Appeals noted (A-10, n. 4), there is no issue presented here

> "of whether [petitioner's] injury was sustained as a result of city-service and was not a result of wilful negligence by the employee, these issues [being] quite different from the one here presented."

Thus, even assuming, as the courts below held, that the instant determination was required to satisfy due process standards, the issue presented here is what due process requires of respondents in the narrow context of a determination whether a member of the Retirement System is disabled.

Accordingly, to the extent petitioner here urges as a reason for the issuance of a

writ of certiorari the possibility of "Error on Non-Medical Issues" (Pet., pp. 10-15), it would seem that he must run afoul of this Court's policy to "avoid passing prematurely on constitutional questions." Kremens v. Bartley, 431 U.S. 119, 128 (1977). See Point I, infra.

POINT I

PETITIONER SEEKS TO RAISE ISSUES WHICH ARE NOT ADEQUATELY PRESENTED BY THE FACTS, AND NOT RIPE FOR ADJUDICATION.

Although the decision of the Court of Appeals was specifically limited to the narrow issue of the procedure due to a member of the Retirement system found not to be disabled, petitioner questions the constitutionality of procedures used by respondents and the Medical Board in the context of non-medical decisions.

Petitioner argues that the action was originally brought as a class action, that it should properly have been so certified, and that the issue of tne procedures used in making non-medical decisions would nave arisen in the context of such class action. However, class certification was not granted, and the record does not show facts sufficient to make an informed decision on the constitutionality of the procedures used in making non-medical determinations. The record does not show under what circumstances disability pension benefits are denied for non-medical reasons; nor does it show what kind of hearing is held, and whether an opportunity for cross-examination is provided.

Furthermore, there nas been no finding concerning what the New York courts have held due process to require in the context of non-medical determinations.

This Court has recently reaffirmed its policy "to avoid passing prematurely on constitutional questions." Kremens v. Bartley, 431 U.S. 119, 128 (1977); see also, New York City Transit Authority v. Beazer, 99 S. Ct. 1355, 1364 (1979). The issues petitioner seeks to raise concerning the constitutionality of respondents' procedures, in the context of non-medical determinations, are prematurely raised in that they are not presented by the facts of this case, and have not been decided by the New York courts.

POINT II

ASSUMING PETITIONER HAD A PROPERTY RIGHT IN RETIREMENT BENEFITS, THE PROCEDURE BY WHICH PETITIONER WAS FOUND NOT DISABLED SATISFIED THE DUE PROCESS REQUIREMENTS SET FORTH IN PRIOR DECISIONS OF THIS COURT.

The facts of the present case do not raise any constitutional questions con-

cerning the requirements of due process not already answered by this Court in Mathews v. Eldridge, 424 U.S. 319 (1976). The Court's discussion of the three distinct factors in Eldridge illuminating the requirements of due process -- the private interest affected by the official action, the risk of erroneous deprivation of such interest tnrough the procedures used as compared to the value of additional or substitute procedural safeguards, and the Government's interest -- is applicable as well to the facts of this case.

1. The Private Interest Affected.

The Court in Eldridge found that, in view of the potential sources of temporary income available to one who has had disability retirement rights terminated, there was less reason in that case than in Goldberg v. Kelly, 397 U.S. 254 (1970), to

depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action. The instant case does not even involve the termination of benefits already received, but rather the initial determination of eligibility for retirement disability benefits. In addition petitioner here received payment and benefits from other sources.*

2. The Risk of Erroneous Deprivation and the Comparative Value of Additional Procedures.

Petitioner focuses much of his argument on the risk of error on non-medical issues, but as has been pointed out, supra, pp. 2-4, the facts of the present case do not properly raise such issues. This case, like Eldridge,

*The New York Workman's Compensation Board and the Social Security Administration (A-4, n. 1, A-10)

involves a medical assessment of petitioner's disability.

As petitioner notes, the Medical Board does not keep a record of reversals on reconsideration or through state judicial review; however, petitioner admits the similarity between this case and Eldridge when he seeks to adopt the reversal rate cited in Eldridge as evidence of the risk of error by respondents (Petition, p. 16). His argument is flawed to the extent that he cites the reversal rate of 58.6% relied upon by the petitioner in Eldridge, but rejected by this Court. Eldridge held instead that the reversal rate was actually 12.2%, or, netting out reconsideration reversals requiring a median period of two months before determination, as low as 3.3%. 424 U.S. at 346, n. 29.

Instead of the procedure presently used to determine disability, consisting

essentially of a decision on the basis of medical reports, x-rays, and other documentation submitted by doctors and experts for both sides, petitioner would require a hearing including the opportunity to appear and present oral testimony, and the opportunity to confront and cross-examine adverse witnesses. But, as this Court has held in two previous cases, Eldridge, supra, and Richardson v. Perales, 402 U.S. 389 (1971), such additional procedural burdens are not necessary in tne context of a determination of medical disability.

Perales took note of judicial recognition of "the reliability and probative worth of written medical reports even in formal trials" (402 U.S. at 405), and held that tne requirements of Goldberg v. Kelly, supra, were not applicable because, in cases such as this, "tne specter of ques-

tionable credibility and veracity is not present; there is professional disagreement witn the medical conclusions, to be sure, but there is no attack here upon the doctor's credibility or veracity" (402 U.S. at 407). Tne Court likewise distinguished Goldberg v. Kelly in its decision in Eldridge, noting that "the decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists... concerning a subject whom they have personally examined" and that "[t]he potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in Goldberg." 424 U.S. at 344-345.

3. The Government's Interest in Avoiding Additional Administrative Costs Not Necessary to Fair Determinations.

The Employees Retirement System is a fund set up for the protection of members, and relying to a great extent on the contributions of members. The additional administrative costs created by a decision requiring the procedures petitioner seeks would be borne largely by the member contributors, without guarantee that the additional procedures would significantly reduce the number of erroneous decisions. See, Eldridge, 424 U.S. at 347, 348, citing Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). In the absence of a showing that the present procedure is particularly error-prone, or that it deprives members of the right to a fair determination on the relevant evidence, due process

does not require the substitution of more expensive and time consuming procedures in the context of medical determinations.

Contrary to petitioner's claim (Pet. pp. 19, 20), the decision of the Court of Appeals was not a major departure from the precedents of this Court, but a direct application of the decisions in Eldridge and Perales, refusing to require a trial-type hearing in determinations of medical disability, to the very similar facts here.

POINT III

PETITIONER DOES NOT HAVE A PROPERTY RIGHT IN ANTICIPATED DISABILITY BENEFITS REQUIRING THE APPLICATION OF FEDERAL DUE PROCESS STANDARDS.

For the reasons already stated, respondents do not consider the granting of the instant petition for certiorari necessary or appropriate. In addition, it is our con-

tention that, even were certiorari to be granted, petitioner could not show a property right in disability benefits requiring the application of due process standards, because he has never enjoyed or been held entitled to those benefits.

For all the similarities between the present case and Eldridge, supra, there is an important distinction between the two: Whereas this case involves the initial determination as to eligibility for benefits, Eldridge involved the termination of benefits. See Eldridge, supra, 424 U.S. at 332 ("The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions... that the interest of an individual in continued receipt of these benefits is a statutorily

created 'property' interest protected by the Fifth Amendment." (Emphasis supplied)). Similarly, both Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 11 (1978), cited by the Court of Appeals, and Goldberg v. Kelly, supra, involved the termination of, respectively, services and benefits already enjoyed.

If there is a property interest in accident disability retirement benefits before one is found to qualify for such benefits, that entitlement is not assumed to be present, but must be determined with reference to New York state law. Bishop v. Wood, 426 U.S. 341, 344 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). However, the New York statute here relevant, New York City Administrative Code Section B3-40.0*, describes the entitlement

*The complete text of this Section is reproduced as note 3 to the Second Circuit opinion, found in Appendix A to the petition, at A-5 - A-6.

to such benefits in terms of the procedure to be used to determine disability:

> "Medical examination of a member in city-service for accident disability and investigation of all statements and certifications by him or on his behalf in connection therewith shall be made upon the application [of enumerated persons]. If such medical examination and investigation shows that any member... is physically or mentally incapacitated for the performance of city-service as a natural and proximate result of an accidental injury received in such city-service while a member, [and other conditions are met,] the medical board shall so certify to the board... and such board shall retire such member for accident disability forthwith."

In Arnett v. Kennedy, 416 U.S. 134, 152 (1974), Justice Rehnquist stated, in discussing the property right conferred by the Lloyd-LaFolette Act, "Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to hold that the substantive right may

be viewed wholly apart from the procedure provided for its enforcement."

Where a state entitlement is so deeply imbedded in the procedures for determining a member's eligibility for benefits, that entitlement should not be given an existence separate from the state procedures, triggering federal Constitutional due process requirements. If there is a property right at all before the determination of disability, it is a right to the fair and equitable application of the procedures provided by statute.

We do not believe the decisions of this Court have gone any further than this in regard to determinations of initial eligibility for benefits under State law, and for this Court to hold, as did the Court of Appeals here, that such an inchoate expectation is itself "property" in the constitutional sense would have serious implications for

our federal system. Neither this Court's analysis in Goldberg v. Kelly, nor the cases cited by it in its discussion of the "new property" require such a result.* And, if the "property" analysis adopted by the Court of Appeals in this case is taken to its logical conclusion, there is no way to avoid the implication that applicants for admission to State schools or colleges have a property right to such admission, bidders on public contracts have a similar right to be awarded the contracts they seek, and, of course, candidates for civil service appointments have a corresponding property interest in the jobs they apply for.

*See 397 U.S. 254, at 262, cases cited in text and in note 9. All of the cases there cited either involved a separate constitutional limitation on governmental action, such as the First or Fifth Amendments, or presented instances where either the benefit was already enjoyed (Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir., 1961), cert. denied, 368 U.S. 930 (1961)), or entry into a profession or business was being denied without due process. None of these cases, we submit, except for the Dixon case, in fact supports Goldberg v. Kelly's "property" analysis.

In all of these contexts, we submit, utilization of a property analysis as a means of subjecting state action to federal court scrutiny beyond what is already available under the Due Process and Equal Protection Clauses is clearly not necessary and would only work mischief.

CONCLUSION

The petition for a writ of certiorari should be denied.

April 13, 1979

Respectfully submitted,

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